

Illinois EPA Response to USEPA, Region 5's September 2010
*“Initial Results of an Informal Investigation of the National Pollutant
Discharge Elimination System Program for Concentrated Animal
Feeding Operations in the State of Illinois”*

October 1, 2010

This document contains bullet-form responses to the findings, required actions and recommendations made by Region 5 in their response to the petition to withdraw the NPDES program, based on reported deficiencies in the CAFO program. Region 5 identified 10 areas of deficiency in seven categories (see Section VI—Initial Findings and Required Actions, pages 34—41). In this briefing, we follow the same format and order used in the Region 5 report. Note that the Region 5 “Required Actions” are the critical elements to improve the CAFO program and achieve compliance with the delegation agreement and 40 CFR 123. The “Recommendations” are for improved effectiveness of our program.

Statement of Deficiencies identified by Region V

1. Permitting Program

Findings:

- Region 5 identified only 5 of 76 applications that had been processed to completion (as of October 2009).
- Some of the applications were years old.
- IEPA sent multiple requests for additional information to the applicant.
- IEPA has determined that 45 old applications do not need to be permitted.

Region 5 required actions:

- IEPA to issue permits in a timeframe to be negotiated with EPA.
- Issue permits in phases, starting with the 76 now on-hand.
- Issue or deny permits to the 45 IEPA has indicated do not need permits.
- Need to establish a consistent and escalating process for non-responding applicants.

Region 5 recommends:

- IEPA should consider establishing an unambiguous requirement for CAFOs to apply for a permit.
- IEPA should acquire the ability to collect information and/or enforcement authority to compel submittal of complete information from applicants.

Illinois EPA Response

- According to the most recent PPA, we were to issue 8 permits by 1/31/10 and we issued 6 permits.
- We were required to issue 32 permits by 8/30/10. Due to application deficiencies and delayed application filings, IEPA contacted Region 5 to arrange for the issuance of Administrative Orders. Recently, after being advised by IEPA, the operator submitted a revised schedule. Under this revised schedule, the operator will submit additional 11 applications within the next 30 days.
- For the remaining incomplete applications (36), the PPA specified IEPA had 24 months to act on these incomplete applications. IEPA has issued 8 additional permits, have referred 9 cases to Region 5 for AOs, have received information to complete 7 previously deficient applications, and we have also received and are now reviewing 8 new applications.
- The permit and application numbers used by Region 5 have changed—we now have 14 permits issued.
- We identified the old applications (the 45 applications mentioned by Region 5) as facilities that were no longer in existence or in need of a permit. IEPA has made site visits for many of these facilities. IEPA would like a discussion with R5 on the need to issue or deny a permit application, as suggested in the Findings.
- To address non-respondents, we have arranged with Region 5 to refer these files to Region 5 for issuance of Administrative Orders under Section 308 and 309 of the CWA. This process began in July 2010. To date approximately 9 facilities have been referred to Region 5.

Workshare opportunities that will address deficiencies, or that will result in freeing up resources to address deficiencies

- Region 5 could review the decisions made by IEPA regarding the 45 old applications and determine if permit denial, under Section 39(a) of IPCB rules, is the appropriate action.
- Region 5 could identify and recommend statutory language from other states that provide the “unambiguous requirement” for permit applications.

Statement of Deficiencies identified by Region V

2 (A). Compliance Evaluation/Inspection Program

Findings:

- IEPA lacks a comprehensive survey of CAFOs.
- IEPA lacks a formal agreement with the Illinois Department of Agriculture to obtain information from applications filed with IDOA under the LMFA.

Region 5 required actions:

- IEPA must conduct and maintain a survey, to be entered into ICIS.

Region 5 recommends:

- IEPA should establish procedures with IDOA and other state agencies as appropriate to review plans and applications.

Illinois EPA Response

- IEPA's understanding is that the review of the IDOA applications alone cannot be used to determine if an NPDES permit is required. LMFA requirements for design of non-discharging facilities do not tell if it is to be operated or maintained to discharge. IEPA would like a discussion on this topic to understand R5's approach.

Workshare opportunities that will address deficiencies, or that will result in freeing up resources to address deficiencies

- Region 5 can assist in the funding and review of the WIU produced inventory.

Statement of Deficiencies identified by Region V

2 (B). Compliance Evaluation/Inspection Program

Findings:

- IEPA has not conducted comprehensive inspections to determine whether unpermitted CAFOs need permits.
- IEPA has serious deficiencies in its ability to inspect and monitor.
- IEPA lacks inspection procedures sufficient to determine compliance or noncompliance.
- IEPA failed to conduct routing periodic inspections and has not met the EnPPA concerning the implementation of the national CMS (e.g., inspect CAFOs every 5 years).

Region 5 required actions:

- IEPA develop an SOP for CAFO inspections.
- IEPA develop an SOP for inspection reports.
- IEPA develop and inspection checklist that aligns with the requirements of our CAFO general NPDES permit.

Region 5 recommends:

- IEPA should enter all CAFO inspections into ICIS.

Illinois EPA Response

- Development of the SOPs for inspections and reports can be done.
- We believe the underlying problems with CAFO inspections (i.e., lack of resources and an inventory) has little to do with the lack of SOPs for inspections and report drafting.

Workshare opportunities that will address deficiencies, or that will result in freeing up resources to address deficiencies

- Region 5 could provide a sample inspection checklist.

Statement of Deficiencies identified by Region V
2 (C). Compliance Evaluation/Inspection Program

Findings:

- It is unclear whether IEPA consistently responds adequately to complaints.
- Not clear that IEPA provides timely responses to complainants.

Region 5 require actions:

- IEPA shall investigate and provide written responses to citizen complaints.
- IEPA should establish written procedures for responding to complaints for CAFOs.

Region 5 recommends:

- None.

Illinois EPA Response

- IEPA will make every effort to provide timely written responses to citizen complaints.

Workshare opportunities that will address deficiencies, or that will result in freeing up resources to address deficiencies

- None.

Statement of Deficiencies identified by Region V

3 (A). Enforcement Program

Findings:

- IEPA is not taking timely and appropriate enforcement in response to NPDES violations.
- IEPA does not follow national compliance and enforcement policy and guidance.
- IEPA's standard of environmental harm is not consistent with CWA policy.
- Enforcement actions do not consistently require CAFOs to apply for NPDES permits.

Region 5 required actions:

- IEPA must take timely and effective enforcement and therefore must revise its EMS to include a time frame for making enforcement decisions.
- The EMS guidance should also require that where a CAFO has a discharge or is designed, constructed, operated and maintained to have one, a permit must be required.
- The EMS needs to assure consistency in the enforcement of CAFO discharges and other NPDES types of discharges.

Region 5 recommends:

- IEPA seek authority to issue Administrative Orders and penalties.

Illinois EPA Response

- It is unclear if, in questioning the timeliness of our decision making, Region 5 refers to decisions leading up to enforcement (e.g., those made prior to a determination to issue an NCA or a VN). Section 31 process imposes certain steps and timelines that IEPA must follow. We would like a better understanding of your comment.
- Region 5's comment that we often do not require NPDES applications in the case of actual discharges is factual for older cases. IEPA livestock regulations prior to the 2003 and 2008 federal CAFO rule contained several permit exemptions, including one for the exemption for certain discharges from livestock operations (the 25 year, 24 hour precipitation caused discharge). More recent cases have required NPDES permits.
- IEPA agrees with the recommendation to seek authority to issue Administrative Orders and penalties.

Workshare opportunities that will address deficiencies, or that will result in freeing up resources to address deficiencies

- Federal guidance is needed regarding the application of the principle to require permits where a CAFO has a discharge or is designed, constructed, operated and maintained to have one.

Statement of Deficiencies identified by Region V

3 (B). Enforcement Program

Findings:

- IEPA is not assessing adequate penalties against CAFOs.
- IEPA has not referred sufficient number of cases to the AG based on the number of CAFOs in chronic or serious noncompliance.

Region 5 required actions:

- Revise the EMS to ensure escalation of enforcement in a manner consistent with the violations.

Region 5 recommends:

- Updating the EMS to include additional instructions on calculating and documenting penalties, as included as a recommendation in the 2007 SRF.

Illinois EPA Response

- Region 5 cites (page 27) that since 62.5% of VNs fail to bring the CAFO into compliance, the system has failed. We are taking that statement to mean that VNs alone—without further action via a NIPLA or referral to the AG—are expected to resolve all violations. Again, IEPA must follow Section 31 process to resolve enforcement cases in Illinois.
- IEPA will revise the EMS as necessary so that penalty recommendations to the Illinois Attorney General are appropriate and consistent. However, the Section 31 process, when used for enforcement in CAFO and other enforcement cases, must be followed.

Workshare opportunities that will address deficiencies, or that will result in freeing up resources to address deficiencies

- None.

Statement of Deficiencies identified by Region V

4. Response to citizen requests for information

Findings:

- IEPA's unwritten policy is to provide copies of pending NPDES permit applications for CAFOs to citizens that request them.

Region 5 required action:

- None.

Region 5 recommends:

- IEPA develop a written policy describing how it will address citizens request for applications.

Illinois EPA Response

None.

Workshare opportunities that will address deficiencies, or that will result in freeing up resources to address deficiencies

- None.

Statement of Deficiencies identified by Region V

5. Compliance with the Memorandum of Agreement and Performance Partnership Agreement between Illinois EPA and EPA

Findings:

- IEPA has not met its MoA and PPA requirements for CAFOs.
- IEPA has also not met the national CMS of FY2009.

Region 5 required actions:

- IEPA must compile an inventory of CAFOs.
- IEPA must issue permits to CAFOs that need them.
- Maintain an EMS consistent with regulatory policy.
- For the above, schedules and timeframes for completion are needed.

Region 5 recommends:

- None.

Illinois EPA

- Refer to 2(A) for a discussion on the development of the inventory.
- Region 5 cites the fact that we missed issuing 10 permits by 6/30/09 to support the claim that IEPA has not complied with the PPA. The PPA states (pages 39-40) that IEPA must issue 8 permits by 1/31/10 (we issued 6) and 32 by 8/30/10 (we issued another 8).
- The Findings fail to describe the headway made in moving applications forward:

- acquiring needed information through IEPA/Region 5 cooperative efforts to issue AOs,
- through inspections to determine if facilities existed and if they needed permits.
- In short, we are closely following what Region 5 agreed to in the PPA. As the PPA requires, IEPA is:
 - requiring NMPs (including stormwater and emergency management plans and controls)
 - posting the notices of applications and intent to issue permits under the CAFO general permit.
- IEPA will share the complete draft of the CAFO rule with Region 5 and deliver the draft by December 1.
- Within the context of MoA and PPA compliance, the Findings fail to acknowledge the issue that IEPA is resources limited. This issue appears multiple times in the report on page 32.

Workshare opportunities that will address deficiencies, or that will result in freeing up resources to address deficiencies

- None.

Statement of Deficiencies identified by Region V

6. Organization and resources

Findings:

- IEPA inspectors (FOS staff) are being relied on for both permitting and inspection activities, along with other duties.

Region 5 required actions:

- IEPA must prepare a workload assessment to determine the number of FTEs needed to effectively implement the NPDES program for CAFOs.
- IEPA must develop a long-term plan for obtaining and training future CAFO inspectors.
- IEPA must allocate staff to CAFO permitting, compliance evaluation and enforcement as required to implement an effective program.

Region 5 recommends:

- None.

Illinois EPA

- IEPA will prepare a preliminary workload assessment in the next 3 to 6 months.
- IEPA will coordinate a training effort with the assistance and cooperation of Region 5.
- IEPA has budgeted 7-8 new FTEs to work in the CAFO program for the SFY11. These new staff will be used to increase the effort in CAFO permitting, compliance evaluation and enforcement.
- Once these new staff are onboard and having been trained appropriately, we will structure our CAFO program into two distinct groups—one for CAFO permitting and the other for compliance/enforcement.

Workshare opportunities that will address deficiencies, or that will result in freeing up resources to address deficiencies

- Region 5 can provide contractual and staff assistance to train current and future CAFO staff.

Statement of Deficiencies identified by Region V

7. Legal authority

Findings:

IEPA has not updated its NPDES program for CAFOs, in particular its rule and technical standards for nutrient management, consistent with the federal CAFO regulations as revised.

Region 5 required actions:

IEPA must revise its rules and nutrient management standards (Subtitle E).

Region 5 recommends:

None.

Illinois EPA Response

- The IEPA has been working with a stakeholders group to develop CAFO rules for Illinois.
- The IEPA first met with the stakeholders in December 2009.
- IEPA intends to complete the initial draft in the next couple of weeks, and send out to the CAFO workgroup for review. After receiving comments from these stakeholders, by December 1 we will send a revised draft to Region 5 for review.

Workshare opportunities that will address deficiencies, or that will result in freeing up resources to address deficiencies

- None at this time.